## Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO PA-24NCvC-1120–11 OF 2022
ANAND PONNUDURAI J
21 FEBRUARY 2023

*Civil Procedure — Injunction — Fortuna injunction — Application for — Plaintiff filed application to restrain defendant from presenting winding up petition — Whether plaintiff acknowledged and admitted alleged debt — Whether there was bona fide dispute of alleged debt — Whether dispute as to debt was such that it would affect the likelihood or chances of success of intended winding up petition — Whether presentation of winding up petition would cause irreparable harm to plaintiff*

The parties entered into a construction contract where the defendant ('PTE') had been appointed by the plaintiff ('SFSB') as the main contractor for a construction project. A dispute arose between the parties in respect of the issuance of certificate of practical completion and the extension of time No 4 by the consultant that was in contravention with the construction contract, SFSB's claim for liquidated ascertained damages ('LAD') and set off and/or deductions contractually available to SFSB. PTE commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against SFSB for the total amount of RM3,006,411.47. The adjudicator handed down the adjudication decision in favour of PTE and awarded a sum of RM2,422,892.17 to PTE and held that, inter alia, the set off and/or deduction claim by SFSB was dismissed and the sum of RM2,422,892.17 being the adjudicated amount after deducting the sum of RM583,519.30 being the variation order admitted by SFSB, was to be paid by SFSB. SFSB commenced arbitration proceedings against PTE by way of a notice of arbitration to claim for, amongst others, LAD, debit notes and back charges for a total sum of RM4,797,520.83. The matter was now pending further directions from the arbitrator. SFSB then filed an application for a stay pending arbitration pursuant to s 16(1)(b) of the CIPAA ('OS 22'), which was allowed pending arbitration but only in part in respect of PTE's claim for loss and expenses amounting to RM624,405.91. The balance sum of RM909,465.38 was not stayed and a sum of RM624,405.91 was ordered to be placed in a fixed deposit account held by SFSB's solicitor pending the disposal of the arbitration proceedings. PTE then served a statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 seeking payment of a sum of RM563,983.10 being the payment due under payment certificate No 16 for works done by them on the project ('the alleged debt') and that there was an alleged admission by SFSB on the same. SFSB denied any alleged admission

and contended that the sum of RM563,983.10 was a disputed debt and requested the statutory notice to be withdrawn. However, PTE refused to withdraw the statutory notice. SFSB then immediately filed this application for a Fortuna injunction to restrain PTE from presenting a winding up petition.

**Held,** allowing the application:

(1) There was never an express or unequivocal admission of the alleged debt. Whilst SFSB had consistently made reference to a sum of RM583,519.30 being due, such was immediately followed by the qualification that — 'however, this amount is subject to deduction of LAD'. Whilst they clearly acknowledged that the payment certificate No 16 had been issued and was due, they certainly consistently took the view that whether such sum was payable or not was subject to their rights to set off. SFSB's assertion of a contractual right to set off could not be assumed as an admission of liability for the alleged debt or that it was payable (see paras 21–22).

(2) This was not a case of a belated bare denial of the alleged debt but there was a bona fide dispute of the same. SFSB had acted with urgency and promptitude at every step of the litigation process to, inter alia, challenge and set aside the adjudication decision and challenge the issuance of the statutory notice including the filing of this application to restrain the presentation of the winding up petition. Further, SFSB had to date paid a total of RM17,134,386.32 to PTE which clearly showed SFSB's sincere conduct in honouring its obligations under the contract. SFSB had also commenced arbitration proceedings to finally determine the dispute between the parties, including pursuing a claim of RM4,797,520.83 against PTE as evidenced in the notice of arbitration which far exceeded the alleged debt of RM563,983.10. In this regard, SFSB had a genuine crossclaim of RM4,797,520.83. There was a genuine and bona fide dispute of the alleged sum and SFSB had accordingly succeeded in establishing a prima facie case that the debt was bona fide disputed (see paras 26, 29–30, 32 & 35).

(3) There were certainly issues that amounted to a dispute that fell within the arbitration agreement that would need to be determined in the arbitration proceedings and thus SFSB had satisfied the court that they had also passed the lower threshold prima facie case. The disputed debt ought to be contested in the agreed contracted forum ie arbitration proceedings. It was certainly in the interest of justice to allow the application and for parties to abide by the outcome of the arbitration proceedings as contractually agreed and already underway (see paras 46, 52 & 54).

(4) SFSB had shown that they were a commercially solvent entity and that the presentation of any winding up petition would cause irreparable

harm and would have severe repercussions on them. The payment of the alleged debt into SFSB's solicitor's clients' account constituted a security or a compounding of the sum demanded under the statutory notice. Given SFSB's ability to satisfy the judgment sum, this would mean that the petition if presented, it would have no chance of success and be bound to fail (see paras 55, 58 & 60).

(5) The repercussions of the presentation of a winding up petition were far-reaching and would be devastating to SFSB's business and various other third parties including homebuyers as SFSB was currently engaged in numerous major construction projects and the presentation of a winding up petition would have adverse implications on these projects and its business where it would cause SFSB to breach its contractual obligations and risk being sued for breach of contract by third parties and consequently affect the purchasers of these properties too. The adverse implications would further damage SFSB's business relationships with its business partners. SFSB's banking facilities with financial institutions would also be affected as SFSB's bank accounts would be suspended thereby impacting SFSB's ability to operate its business as a major property developer. In these circumstances, PTE's presentation of a winding up petition would inevitably and irreparably affect SFSB's image, reputation and SFSB's ability to meet existing contractual obligations (see paras 63–66).

**[Bahasa Malaysia summary**

Pihak-pihak telah menandatangani satu kontrak pembinaan di mana defendan ('PTE') telah dilantik oleh plaintif ('SFSB') sebagai kontraktor utama untuk satu projek pembinaan. Pertikaian timbul antara pihak berkenaan dengan pengeluaran sijil perakuan siap kerja dan lanjutan masa No 4 oleh perunding yang bercanggah dengan kontrak pembinaan, tuntutan SFSB untuk ganti rugi tertentu dan ditetapkan ('GTD') dan tolakan dan/atau potongan tersedia secara kontrak kepada SFSB. PTE memulakan prosiding adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') terhadap SFSB untuk jumlah keseluruhan RM3,006,411.47. Adjudikator menjatuhkan keputusan adjudikasi yang memihak kepada PTE dan memberikan sejumlah RM2,422,892.17 kepada PTE dan berpendapat, antara lain, tuntutan tolakan dan/atau potongan oleh SFSB telah ditolak dan jumlah RM2,422,892.17 adalah amaun yang diadili selepas ditolak jumlah RM583,519.30 sebagai perintah variasi yang diakui oleh SFSB, perlu dibayar oleh SFSB. SFSB memulakan prosiding timbang tara terhadap PTE melalui notis timbang tara untuk menuntut, antara lain, GTD, nota debit dan caj kebelakang untuk jumlah keseluruhan RM4,797,520.83. Perkara itu kini menunggu arahan lanjut daripada penimbang tara. SFSB kemudiannya memfailkan permohonan penangguhan sementara menunggu timbang tara menurut s 16(1)(b) APAIP ('OS 22'), yang dibenarkan sementara menunggu

timbang tara belum selesai tetapi hanya sebahagiannya berkenaan dengan tuntutan PTE bagi kerugian dan perbelanjaan berjumlah RM624,405.91. Jumlah baki sebanyak RM909,465.38 tidak ditangguhkan dan sejumlah RM624,405.91 diperintahkan untuk dimasukkan ke dalam akaun simpanan tetap yang dipegang oleh peguam FSB sementara menunggu pelupusan prosiding timbang tara. PTE kemudiannya menyampaikan notis statutori menurut s 466(1)(a) Akta Syarikat 2016 meminta bayaran sejumlah RM563,983.10 sebagai bayaran yang perlu dibayar di bawah sijil pembayaran No 16 untuk kerja yang dilakukan oleh mereka ke atas projek tersebut ('hutang yang didakwa') dan bahawa terdapat pengakuan yang didakwa oleh SFSB atas perkara yang sama. SFSB menafikan sebarang dakwaan pengakuan dan berpendapat bahawa jumlah RM563,983.10 adalah hutang yang dipertikaikan dan meminta notis statutori itu ditarik balik. Walau bagaimanapun, PTE enggan menarik balik notis statutori itu. SFSB kemudian segera memfailkan permohonan ini untuk injunksi Fortuna untuk menghalang PTE daripada mengemukakan petisyen penggulungan.

**Diputuskan**, membenarkan permohonan:

(1) Tidak pernah ada pengakuan yang nyata atau jelas mengenai hutang yang didakwa itu. Walaupun SFSB secara konsisten membuat rujukan kepada jumlah RM583,519.30 yang perlu dibayar, itu serta-merta diikuti dengan pembatasan bahawa — 'walau bagaimanapun, jumlah ini tertakluk kepada potongan GTD'. Walaupun mereka dengan jelas mengakui bahawa sijil pembayaran No 16 telah dikeluarkan dan perlu dibayar, mereka secara konsisten mengambil pandangan bahawa sama ada jumlah tersebut perlu dibayar atau tidak tertakluk kepada hak mereka untuk menolak. Penegasan SFSB mengenai hak kontrak untuk menolak tidak boleh dianggap sebagai pengakuan liabiliti untuk hutang yang didakwa atau bahawa ia perlu dibayar (lihat perenggan 21–22).

(2) Ini bukanlah satu kes penafian semata-mata yang terlewat atas hutang yang didakwa tetapi terdapat pertikaian bona fide perkara yang sama. SFSB telah bertindak dengan segera dan pantas pada setiap langkah proses litigasi untuk, antara lain, mencabar dan mengetepikan keputusan adjudikasi dan mencabar pengeluaran notis statutori termasuk pemfailan permohonan ini untuk menghalang penyampaian petisyen penggulungan. Selanjutnya, SFSB setakat ini membayar sejumlah RM17,134,386.32 kepada PTE yang jelas menunjukkan kelakuan ikhlas SFSB dalam memenuhi obligasinya di bawah kontrak. SFSB juga telah memulakan prosiding timbang tara untuk akhirnya menentukan pertikaian antara pihak-pihak, termasuk meneruskan tuntutan sebanyak RM4,797,520.83 terhadap PTE seperti yang dibuktikan dalam notis timbang tara yang jauh melebihi hutang yang didakwa berjumlah RM563,983.10. Dalam hal ini, SFSB mempunyai tuntutan silang sah sebanyak RM4,797,520.83. Terdapat pertikaian sah dan bona fide

mengenai jumlah yang didakwa dan SFSB telah berjaya mewujudkan kes prima facie bahawa hutang itu dipertikaikan secara bona fide (lihat perenggan 26, 29–30, 32 & 35).

(3) Terdapat isu-isu yang merupakan pertikaian yang termasuk dalam perjanjian timbang tara yang perlu ditentukan dalam prosiding timbang tara dan dengan itu SFSB telah memuaskan hati mahkamah bahawa mereka juga telah melepasi kes prima facie ambang rendah. Hutang yang dipertikaikan harus dicabar dalam forum kontrak yang dipersetujui iaitu prosiding timbang tara. Adalah pasti demi kepentingan keadilan untuk membenarkan permohonan itu dan bagi pihak-pihak untuk mematuhi keputusan prosiding timbang tara seperti yang dipersetujui secara kontrak dan sedang dijalankan (lihat perenggan 46, 52 & 54).

(4) SFSB telah menunjukkan bahawa mereka adalah entiti solven secara komersial dan bahawa penyampaian mana-mana petisyen penggulungan akan menyebabkan kemudaratan yang tidak boleh diperbaiki dan akan membawa kesan yang teruk kepada mereka. Pembayaran hutang yang didakwa ke dalam akaun klien peguam SFSB merupakan sekuriti atau pengkompaunan jumlah yang dituntut di bawah notis statutori. Memandangkan keupayaan SFSB untuk memenuhi jumlah penghakiman, ini bermakna petisyen itu jika dikemukakan, ia tidak mempunyai peluang untuk berjaya dan pasti gagal (lihat perenggan 55, 58 & 60).

(5) Kesan daripada penyampaian petisyen penggulungan adalah meluas dan akan memusnahkan perniagaan SFSB dan pelbagai pihak ketiga lain termasuk pembeli rumah kerana SFSB sedang terlibat dalam pelbagai projek pembinaan utama dan penyampaian petisyen penggulungan akan mempunyai implikasi buruk ke atas projek-projek ini dan perniagaannya di mana ia akan menyebabkan SFSB melanggar kewajipan kontraknya dan berisiko disaman kerana melanggar kontrak oleh pihak ketiga dan seterusnya menjejaskan pembeli hartanah ini juga. Implikasi buruk akan merosakkan lagi hubungan perniagaan SFSB dengan rakan kongsi perniagaannya. Kemudahan perbankan SFSB dengan institusi kewangan juga akan terjejas kerana akaun bank SFSB akan digantung sekali gus menjejaskan keupayaan SFSB untuk mengendalikan perniagaannya sebagai pemaju hartanah utama. Dalam keadaan ini, penyampaian petisyen penggulungan PTE pasti akan menjejaskan imej, reputasi dan keupayaan SFSB untuk memenuhi obligasi kontrak sedia ada (lihat perenggan 63–66).]

**Cases referred to**

*AnAn Group (Singapore) Pte Ltd v VTB Bank* [2020] SGCA 33, CA (refd)
*ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99, HC (refd)

A *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365, HC (refd)
*BDG v BDH* [2016] SGHC 211; [2016] 5 SLR 977, HC (refd)
*Bakti Dinamik Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2016] MLJU 916, HC (refd)
B *Bayoil SA; Seawind Tankers Corp v Bayoil SA, Re* [1999] 1 All ER 374, CA (refd)
*Bertam Development Sdn Bhd v R&C Cergas Teguh Sdn Bhd* [2017] MLJU 2276; [2017] 1 LNS 2228, HC (refd)
*Dolomite Readymixed Concrete Sdn Bhd v Zalam Corporation Sdn Bhd* [2008]
C MLJU 270, HC (refd)
*Ecofirst Hartz Sdn Bhd v Poon Mun Cheong & Anor* [2018] MLJU 901, HC (refd)
*Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of The Commonwealth of Australia* [1978] VR 83, SC (refd)
D *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916, HC (refd)
*Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2018] 9 MLJ 305, HC (refd)
*Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ
E 817, CA (refd)
*Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCU 702; [2018] HKCFI 426, CFI (refd)
*Lau Jick Ing v Lim Heng Sean @ Eddie Lim & Anor* [2021] 8 MLJ 9, HC (refd)
*Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, CA
F (refd)
*NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900; [2017] 1 LNS 943, HC (refd)
*PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor* [2021] MLJU 2514, HC (folld)
G *Pacific & Orient Insurance Co Berhad v Mazlan bin Ahmad* [2015] MLJU 764, HC (refd)
*Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
*Prosmier Construction Sdn Bhd v Ching Chee Kong* [2019] MLJU 1216, HC
H (refd)
*Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 3 WLR 491; [2014] EWCA Civ 1575, CA (folld)
*Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd and another case* [2022] MLJU 2865, HC (refd)
I *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458, CA (refd)
*Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465, HC (refd)

*V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2023] 7 MLJ 155, HC (folld)

**Legislation referred to**

Companies Act 1965 (repealed by Companies Act 2016) s 218
Companies Act 2016 ss 465, 466, 466(1)(a)
Construction Industry Payment and Adjudication Act 2012 ss 15(b), (d), 16(1)(a), (1)(b), 28

*Muhammad Faisal Moideen (with Maximilian Tai and Clarence Tang Chok-Wee) (Moideen & Max) for the plaintiff.*
*Daphne Choy (with Tam Xin Shun) (Choy & Assoc) for the defendant.*

**Anand Ponnudurai J:**

INTRODUCTION

**[1]** The parties herein have entered into a construction contract where the defendant ('PTE') had been appointed by the plaintiff ('SFSB') as the main contractor for a construction project in Penang.

**[2]** A dispute arose between the parties which led to adjudication proceedings and an adjudication award was handed down on 22 February 2022. That adjudication award has been the subject matter of various court proceedings to date. There are also currently pending arbitration proceedings between the parties.

**[3]** PTE then had on 27 October 2022 served a statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 ('the CA 2016') seeking payment of a sum of RM563,983.10 being the payment due under payment certificate No 16 for works done by them on the said project ('the alleged debt').

**[4]** SFSB then immediately filed this application on 11 November 2022 for what is commonly referred to as a Fortuna injunction seeking the following relief:

(a) a declaration that the defendant's demand against the plaintiff by way of the statutory notice issued under s 466(1)(a) of the Companies Act 2016 dated 27 October 2022 for a claim amounting to RM563,983.10 ('statutory notice dated 27 October 2022') is a disputed debt and null and void;

(b) a declaration that the defendant is not entitled to present a winding up petition for the winding up of the plaintiff pursuant to the statutory notice dated 27 October 2022;

(c) an injunction be granted to restrain the defendant whether by themselves, their employees, servants or agents or otherwise, from presenting any petition under ss 465 and 466 of the Companies Act 2016 to wind up the plaintiff pursuant to the statutory notice dated 27 October 2022;

(d) an interim injunction be granted to restrain the defendant whether by themselves, their employees, servants or agents or otherwise, from presenting any petition under ss 465 and 466 of the Companies Act 2016 to wind up the plaintiff pursuant to the statutory notice dated 27 October 2022 pending the disposal of the plaintiff's application herein;

(e) an injunction be granted to restrain the defendant whether by themselves, their employees, representatives, agents or solicitors from presenting any petition under ss 465 and 466 of the Companies Act 2016 to wind up the plaintiff pursuant to the statutory notice dated 27 October 2022;

(f) in the event the defendant has already presented a winding up petition against the plaintiff, an injunction be granted to restrain the defendant whether by themselves, their employees, representatives, agents or solicitors from proceeding with the winding up petition which may be presented to this honourable court or to any court against the plaintiff based on the entire amount which is demanded by way of the statutory notice dated 27 October 2022;

(g) the costs of and occasioned by the originating summons be paid by the defendant to the plaintiff; and

(h) that parties be at liberty to apply.

**[5]** The application was supported by an affidavit and parties thereafter exchanged affidavits setting out therein the background facts and their respective positions/contentions.

**[6]** Upon full consideration of the facts and the applicable law and upon hearing learned counsel with the aid of their extensive written submissions, I had on 13 January 2023 allowed SFSB's application and issued the injunction sought and granted order in terms of the plaintiff's originating summons.

**[7]** I will now provide detailed reasons for having allowed SFSB's application by setting out the facts of the case, the parties' rival contentions and my analysis of the same.

THE BACKGROUND FACTS

**[8]** The background facts have been set out in the affidavits filed by the parties but can be summarised as follows:

(a) vide a letter of award dated 7 June 2019, ('LOA'), SFSB being the employer appointed PTE as the main contractor for a project known as 'Proposed Construction of 2-Storey Office Building on Lot 2457, 1826, 1829, 2466 and 1577, Mukim 6, Daerah Seberang Perai Utara, Pulau Pinang' ('the said project') for a provisional amount of RM17,980,417.60 (also referred to as 'the original contract sum'). Upon valuation, the revised contract sum at this juncture is estimated to be RM19,050,248.38 (also referred to as 'the revised contract sum'), subject to further assessment by BYG Architecture Sdn Bhd ('the consultant') and approval by SFSB;

(b) the dispute between SFSB and PTE is in respect of the issuance of certificate of practical completion ('the CPC') and the extension of time No 4 (also known as 'EOT No 4') by the consultant that is in contravention with the construction contract, SFSB's claim for liquidated ascertained damages ('LAD') and set off and/or deductions contractually available to SFSB. PTE's other claims include its claims on performance bond, loss and expense and progress claim No 16R (REV01);

(c) SFSB disputes the issuance of the CPC as a result of the failure of the consultant to ensure that all the requirements under cl 15.1 of the amendments to the PAM contract 2006 are fulfilled prior to the issuance of the same;

The adjudication proceedings:

(d) PTE commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA 2012') against SFSB for, amongst others, the performance bond, loss and expense, unpaid invoices and PTE's progress claim No 16R (REV01) for the total amount of RM3,006,411.47;

The adjudication decision:

(e) on 22 February 2022, the learned adjudicator handed down the adjudication decision in favour of PTE and awarded a sum of RM2,422,892.17 (excluding costs and interests) to PTE. In summary, the learned adjudicator held as follows:

(i) that the set off and/or deduction claim by SFSB is dismissed;

(ii) the works were completed by PTE when the CPC was issued on 11 September 2020. In this regard, the issuance of the CPC dated

A 11 September 2020 is proper and valid;

(iii) the EOT No 4 granted by the consultant until 31 August 2020 is proper and valid;

B (iv) the sum of RM2,422,892.17 being the adjudicated amount after deducting the sum of RM583,519.30 being the variation order (also known as 'VO') admitted by SFSB, is to be paid by SFSB;

(v) the adjudicated amount shall be paid by SFSB to PTE on or before 9 March 2022;

C (vi) interest on the adjudicated amount calculated at 5% pa from 17 November 2021; and

(vii) costs of RM37,000 being the costs of the adjudication proceedings including the adjudication fees and expenses and also AIAC D administrative fees to be paid by SFSB;

SFSB's application to set aside the adjudication decision and PTE's application to enforce the adjudication decision:

E (f) on 9 March 2022, SFSB filed an application to set aside the adjudication decision vide Penang High Court Originating Summons No PA-24C-10–03 of 2022 (referred to as 'OS 10') pursuant to ss 15(b) and 15(d) of the CIPAA 2012. SFSB has also applied for a stay pursuant to s 16(1)(a) of the CIPAA 2012 pending the disposal of OS 10;

F (g) on 25 March 2022, PTE filed an application to enforce the adjudication decision vide Penang High Court Originating Summons No PA-24C-14–03 of 2022 ('OS 14') pursuant to s 28 of the CIPAA 2012;

G (h) by way of a consent order dated 15 March 2022, PTE had agreed to SFSB's application for a stay pending OS 10 and OS 14 being heard together;

(i) on 26 August 2022, in OS 10, I had allowed SFSB's application to set aside only part of the said adjudication decision and sever PTE's claim H for performance bond in the sum of RM889,020.88 in the adjudication decision as well as allowing PTE's application in OS 14 to enforce the AD in part save for the said performance bond amount;

(j) whilst PTE did not appeal against the orders I made on the 26 August I 2022, SFSB has since filed an appeal against my order of not setting aside the rest of/the entire adjudication award. The grounds of my decision in respect of OS 10 and OS 14 can be found at *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd and another case* [2022] MLJU 2865;

(k) prior to my decision in respect of OS 10 and OS 14, SFSB had commenced arbitration proceedings against PTE by way of a notice of arbitration dated 27 April 2022 to claim for, amongst others, liquidated ascertained damages, debit notes and back charges for a total sum of RM4,797,520.83;

(l) the arbitration proceeding was registered on 18 July 2022 and the learned arbitrator has been appointed by the Asian International Arbitration Centre ('AIAC') and the matter is now pending further directions from the learned arbitrator;

SFSB's application to stay enforcement of adjudication decision pending arbitration pursuant to s 16(1)(b) of the CIPAA 2012:

(m) on 1 July 2022, SFSB filed an application for a stay pending arbitration pursuant to s 16(1)(b) of the CIPAA 2012 vide Penang High Court, Originating Summons No PA-24C-22–07 of 2022 ('OS 22');

(n) on 21 September 2022, I had allowed SFSB's application for stay pending arbitration but only in part in respect of PTE's claim for loss and expense amounting to RM624,405.91. The balance sum of RM909,465.38 was not stayed and I have ordered the sum of RM624,405.91 to be placed in a fixed deposit account which is to be held by SFSB's solicitor pending the disposal of the arbitration proceedings. There was no appeal by either party against this decision;

(o) I subsequently on 30 November 2022 upon an application by SFSB also did not grant a stay of execution of the said sum of RM909,465.38. This led to a s 466(1)(a) of the CA 2016 statutory notice being issued by PTE on 19 October 2022 which is now the subject matter of another Fortuna injunction application vide Penang High Court Originating Summons No PA-24NCVC-1081–11 of 2021 pending before Justice Quay Chew Soon;

(p) PTE however then proceeded to issue another statutory notice dated 27 October 2022 on the basis that the consultant had issued payment certificate No 16 for the sum of RM563,983.10 and that there was an alleged admission by SFSB on the same;

(q) in response to the statutory notice dated 27 October 2022, SFSB had through its solicitors issued a letter dated 2 November 2022 to deny any alleged admission and contending that the said sum of RM563,983.10 is a disputed debt and requested the said statutory notice to be withdrawn by 3 November 2022; and

(r) however, PTE refused to withdraw the statutory notice dated 27 October 2022. SFSB was then left with no option but to file the present application for a Fortuna injunction to restrain PTE from presenting a winding up petition.

**[9]** In the meantime, in its affidavits, SFSB has averred and shown proof that the alleged debt sum has been placed by SFSB with their solicitors as stakeholders pending the disposal of this application.

THE RIVAL CONTENTIONS/SUBMISSIONS

*PTE's contentions/submissions*

**[10]** In opposing this application, PTE's submissions can be summarised as follows:

(a) that SFSB has admitted the alleged debt in the adjudication proceedings and in various correspondences. These admissions are alleged to have been made in the payment/adjudication responses by SFSB as well as in their affidavits in some of the previous litigation. In this regard, I have noted that even in the said s 466(1)(a) of the CA 2016 statutory notice, PTE's basis for issuing the same is expressly set out therein, to wit, that SFSB had acknowledged and admitted the alleged debt on various occasions;

(b) that the alleged debt did not form part of the adjudication decision/was in fact excluded from it by the learned adjudicator and as such, all facts and litigation in respect of the adjudication decision are irrelevant;

(c) that although it is not denied that there are pending arbitration proceedings, SFSB has again in those proceedings admitted that the alleged debt is due. In this regard, PTE submits that SFSB has set out their claim in the arbitration as follows:

Setia Fontaines Sdn Bhd's Claim Amount

| No | Item | Amount |
|---|---|---|
| 1 | Overall LAD | RM4,615,000.00 |
| 2 | Debit Note from Setia Readymix, Setia Marketing, Safety Violation & Utility Bill | RM182,520.83 |
| | LESS | |
| 3 | Unpaid Invoices | (RM108,453.66) |
| 4 | IPC No 6 | (RM563,983.10) |
| 5 | Performance Bond | (RM889,020.88) |
| 6 | Variation Order | RM74,814.64 |
| | | RM3,310,877.83 |

(d) that there are no grounds to issue the Fortuna injunction as the dispute of the debt at this stage is an afterthought and the application herein is not bona fide but merely an attempt to avoid payment;

(e) that the arbitration proceedings are without merit and the mere fact of such proceedings is not a valid ground to support this application;

(f) as such, it is contended that there is no bona fide dispute of the alleged debt; and

(g) the solvency of SFSB is irrelevant and PTE ought not to be deprived of their opportunity to commence winding up proceedings which has a good chance of success.

*SFSB's contentions/submissions*

**[11]** On the other hand, SFSB's contentions/submissions can be summarised as follows:

(a) that there is a bona fide dispute of the alleged debt;

(b) that the presentation of the statutory notice is an abuse of process;

(c) that the overall conduct of SFSB prior to and in making this application is material;

(d) that based on the current applicable law, if there exists a dispute which was subject to an arbitration clause, there is a lower threshold prima facie case test to be applied;

(e) that SFSB has a genuine crossclaim which is larger than the alleged debt which has yet to be litigated at arbitration proceedings;

(f) that the alleged debt was never awarded by the learned adjudicator;

(g) that there has been no express or unequivocal admission by SFSB of the alleged debt;

(h) that SFSB is a commercially solvent company and is able to satisfy the debt and as such, any winding up petition is bound to fail;

(i) that the presentation of a winding up petition will cause irreparable harm to SFSB; and

(j) that there are serious issues to be tried in the arbitration proceedings and an injunction ought to be granted herein so as to not defeat the final determination of those issues in the arbitration proceedings.

APPLICABLE LAW AND THE COURT'S ANALYSIS

**[12]** At the outset, there is no dispute that the alleged debt which forms the basis of the statutory notice is not based on any judgment or adjudication decision. In this respect, it is trite law that a statutory notice under s 466 of the CA 2016 need not be based on any judgment or adjudication decision.

**[13]** There is no requirement in law that PTE must obtain a judgment prior to serving SFSB a statutory demand, and regardless of a judgment, an unpaid creditor like PTE is entitled to a winding up order against SFSB (see the High Court cases of *Bertam Development Sdn Bhd v R&C Cergas Teguh Sdn Bhd* [2017] MLJU 2276; [2017] 1 LNS 2228; *Prosmier Construction Sdn Bhd v Ching Chee Kong* [2019] MLJU 1216 and the Court of Appeal case of *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817).

**[14]** In the case of *Bertam Development Sdn Bhd*, Lee Swee Seng J (as His Lordship then was) held that the test to file a winding up petition pursuant to s 465 of the Companies Act 2016 is to see whether there is a debt which cannot be seriously disputed bona fide. His Lordship held as follows:

> [36] It was argued by learned counsel for the plaintiff/applicant that a winding up petition can only be filed on a final judgment. In the present case there is an appeal filed by the plaintiff against the dismissal of the setting aside application and so therefore it is not a final judgment and on this ground alone the petition should be dismissed.
>
> [37] There is no merit in the above submission which is misconceived anyway. First, no way does s 465 of the Companies Act 2016 say that the winding up of a company must be premised upon a judgment debt that is a final judgment in that no appeal has been filed against the judgment or that the appeal has been disposed of in favour of the party who had obtained a judgment in its favour in the first instance. That has not been the law with respect to filing a winding up petition as the test is whether there is a debt which cannot be seriously disputed bona fide.

Further, in the case of *Prosmier Construction Sdn Bhd*, Evrol Mariette Peters JC (as Her Ladyship then was) held that regardless of whether a judgment has been obtained, an unpaid creditor is entitled to a winding up order against a company. Her Ladyship held as follows:

> [24] There is no requirement in law that a creditor must obtain a judgment before serving a statutory demand, and regardless of a judgment, an unpaid creditor is entitled to a winding up order against a company. This was stated by Suriyadi Halim JCA in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 at p 823; [2011] 1 LNS 1763:
>
> > Before we proceed to answer those questions, we should perhaps say that 'a creditor is not required to obtain a judgment before serving a statutory demand ...' (*The Law of Company Liquidation* (4th Ed) by Andrew R Keay at p 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed) by Andrew R Keay at p 91).
>
> [25] The absence of a judgment debt, therefore, is not an indication of an abuse of the process of the court; and it is for the applicant to show a bona fide dispute of the debt.

**[15]** Further, in the High Court case of *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465, a winding up petition was allowed based on the company's failure to make payment of sums certified in interim certificates issued to the company despite there being no judgment.

**[16]** The law and the test for the grant of Fortuna injunction are trite and I can do no better than to reiterate them as succinctly set out by Liza Chan Sow Keng JC (as she then was) in the recent case of *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2023] 7 MLJ 155 where Her Ladyship held as follows:

> [13] The tests for the grant of a Fortuna Injunction are well established. The two principles as set out in *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83 are:
>
> (a) first, where the presentation of a winding up petition which has no chance of success as a matter of law and fact, might produce irreparable damage to the company ('the first Fortuna principle'); and
>
> (b) second, where the party seeking to present the winding up petition chooses to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure ('the second Fortuna principle').
>
> [14] These principles are reiterated instructively in two Court of Appeal cases in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 and three years later in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947. In the later case, Ramly Ali JCA (later FCJ) provided the following useful explanation which merits production in extenso:
>
> > [25] An application for an injunction to restrain an intended winding up petition against a company is known as a 'Fortuna Injunction', taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding up petition and the two principles that guide courts in the grant of an injunction to that effect (see also: *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeal).
> >
> > [26] The first principle laid down in that case is that an injunction of that nature may be granted by court *where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success*. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:
> >
> > (i) *the intended petition has no chance of success, as a matter of law as well as a matter of fact*; and
> >
> > (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.
> >
> > (See: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940 and *Bryanston Finance Ltd v De Vries*

*(No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25).

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore, whether or not it causes irreparable damage is of no consequence. Thus, the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

[28] The second principle established in the Fortuna case is that an injunction of that nature may be granted in cases *where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure*.

[29] *This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented*. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle. (Emphasis added).

[15] In *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 at [8], the Court of Appeal held that when deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds. In *Tan Kok Tong*, the debt was disputed on substantial grounds — not as to its amount, but as to the terms of its repayment.

**[17]** As can be gleaned from the facts of this case and the submissions, the cornerstone of SFSB's case is that there exists a genuine crossclaim based on substantial grounds. The High Court in the case of *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916 had the opportunity to consider the effect of a crossclaim in regards to a debt where Mary Lim J (as Her Ladyship then was) held as follows:

[48] When dealing with the standard of proof applicable for determining the existence of *a substantial and bona fide dispute* in winding up proceedings in the following year in the case of *Pacific Recreation Pte Ltd v Technology Inc*, the Court of Appeal referred to Metalform Asia and reiterated its stand that 'the courts should not be quick to condemn viable companies which have *plausible responses* to claims made against them'.

[49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s 218 notice should also be made in the winding up court. Otherwise, the only viable option is to pay up. Secondly, where *a debt is undisputed*, an injunction may nevertheless be ordered where a *genuine crossclaim*

*based on substantial grounds* is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is *whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made*; as opposed to a test that the petition is bound to fail. (Emphasis added.)

**[18]** As such, in an application like the present, the court has to consider the following:

(a) whether there is a bona fide and substantial dispute as to the debt;

(b) whether the said dispute as to the debt is such that it would affect the likelihood or chances of success of the intended winding up petition;

(c) whether the presentation of a winding up petition would cause irreparable damage to the company; and

(d) where the debt is undisputed, whether there is a genuine crossclaim based on substantial grounds and in this regard the burden of proof in both instances of a disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made.

**[19]** Having set out the above, I will now apply them to the facts at hand with a view to determining whether the issuance of an injunction is warranted.

**[20]** I will first have to consider PTE's contention that SFSB has acknowledged and admitted the alleged debt. It is important though to reiterate that not only was the alleged debt not awarded by the learned adjudicator, it was expressly excluded from the adjudication decision. Whilst there is no doubt that the learned adjudicator had at para 16.3 of the said adjudication decision stated that he was deducting the amount of RM583,519.30 'as admitted by the respondent' — that was his view and surely this court is not bound by that remark. The fact remains that the learned adjudicator never dealt with the alleged debt and excluded the sum from the adjudicated amount. In my view, this court has to consider all facts surrounding the alleged debt and reach its own conclusion as to whether there was in fact an admission or if there is a bona fide dispute on the same especially when the alleged debt has not been determined by any court to date nor adjudicated upon.

**[21]** In relation to the alleged admissions made by SFSB, I find merit in SFSB's submission that there was never an express or unequivocal admission of the alleged debt. Reference was made to the several instances where SFSB is alleged to have made such admissions such as in the payment/adjudication

responses. I have perused these documents and in my view, whilst they have consistently made reference to a sum of RM583,519.30 being due, such is immediately followed by the qualification that — 'however, this amount is subject to deduction of LAD'. As such, I am not convinced that it was an outright admission. In my view, whilst SFSB clearly acknowledged that the payment certificate No 16 had been issued and was due, they certainly consistently took the view that whether such sum was payable or not was subject to their rights to set off.

**[22]** Further, in accordance with cl 30A of the amendments to the PAM contract 2006, SFSB is clearly entitled to set off any monies payable to PTE in the event there are any. In this regard, in my view, SFSB's assertion of a contractual right to set off cannot be assumed as an admission of liability for the alleged debt or that it was payable.

**[23]** I would also pause to add here that SFSB has also drawn the court's attention to the fact that even PTE disputed the amount certified by the architect for payment certificate No 16. Indeed, if one were to peruse PTE's letter dated 17 December 2021 to the architect after the issuance of payment certificate No 16 on 15 November 2021, even PTE disagreed with the amount certified therein.

**[24]** Further, as seen hereinabove, there are also pending arbitration proceedings between the parties where SFSB clearly has proceeded on the basis that it has a crossclaim which is far in excess of the alleged debt.

**[25]** Reverting to the issue of whether there is a bona fide dispute of the alleged debt. In my considered view, SFSB has succeeded in persuading this court that there is a bona fide dispute of the alleged debt which is the subject matter of the ongoing arbitration proceedings to finally determine the dispute. Further, I am also satisfied that there is a genuine crossclaim which exceeds the alleged debt which is precisely their claim in the arbitration proceedings.

**[26]** In addition, in my considered view, this is not a case of a belated bare denial of the alleged debt but there is a bona fide dispute of the same. In this regard, in my view, the overall conduct of SFSB since the beginning of the dispute is material.

**[27]** In this respect, it is apt to refer to the case of *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458 where the Court of Appeal allowed the appeal against the decision of the High Court in allowing a Fortuna injunction. The Court of Appeal took into account the conduct of the respondent in applying for the Fortuna injunction and found that its actions in filing two

notice of application ie to set aside the adjudication decision and to stay the execution of the same 42 days following receipt of the adjudication and more importantly the serving of notice of arbitration the appellant more than seven months after the receipt of the adjudication decision were not consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the adjudication decision or the presentation of a winding up petition.

**[28]** The Court of Appeal in the case of *Sime Darby Energy Solution* held as follows:

> [33] It is settled law that the conduct of a party moving the court for an injunction is a material and vital factor in the determination of whether the injunction sought out to be allowed. The applicant must act timeously to protect his rights.
>
> [34] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396 the Court of Appeal per Gopal Sri Ram JCA (as he then was) remarked that:
>
> > It is cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> [35] We have paid attention to the sequence of events preceding the present OS for a FI. Inter alia, the two notices of application filed by the respondent: to set aside the AD dated 31 October 2019 and to stay the execution of the AD were filed only on 12 December 2019, ie, 42 days following receipt of the AD. More importantly, the respondent's notice of arbitration was served on the appellant only on 11 June 2020, which was more than seven months after the receipt of the AD.
>
> [36] In our considered view, this is not conduct that is consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the AD or the presentation of a winding up petition. On this issue, we do not agree with the LJC's view that the aforesaid delays are irrelevant because there are no deadlines stipulated for the filing of the above notices of application. This view is wrong in principle as a party seeking an injunction or a stay of execution must act timeously.

**[29]** In this case, there is no doubt in my mind that SFSB had acted with urgency and promptitude at every step of the litigation process to, inter alia, challenge and set aside the adjudication decision and challenge the issuance of the statutory notice including the filing of this present application to restrain the presentation of the winding up petition.

**[30]** Further, I have also considered the evidence that this is not a situation where SFSB has not paid any monies to PTE at all. In fact, SFSB has to date

paid a total of RM17,134,386.32 to PTE which clearly shows SFSB's sincere conduct in honouring its obligations under the contract.

**[31]** Additionally, it is indisputable that cl 34 of the amendments to the PAM contract 2006 provides for the appropriate forum and procedure for PTE to pursue PTE's claim of the alleged debt ie arbitration and that the parties will indeed be afforded the opportunity of having the dispute/s resolved in that agreed forum in the near future.

**[32]** It is also crucial to reiterate that in addition to the pending appeals, SFSB has commenced arbitration proceedings to finally determine the dispute between the parties, including pursuing a claim of RM4,797,520.83 against PTE as evidenced in the notice of arbitration dated 27 April 2022, which far exceeds the alleged debt of RM563,983.10. In this regard, it does appear that SFSB has a genuine crossclaim of RM4,797,520.83.

**[33]** In this regard, SFSB's crossclaim in the arbitration proceedings consists of the following:

(a) overall LAD from 21 August 2020–29 December 2020 amounting to RM4,615,000; and

(b) debit note(s) by Setia Ready Mix Sdn Bhd, SP Setia Marketing Sdn Bhd and back charges of safety violation and utility bill amounting to RM182,520.83.

**[34]** SFSB's LAD claim is premised on cll 7 and 9 of the letter of award and in total, the delays for the completion of the ground floor, first floor and overall of the project are 288 days, 185 days and 130 days respectively. In respect of the debit notes issued by Setia Ready Mix Sdn Bhd and SP Setia Marketing, those debit notes are pursuant to a tripartite agreement entered with SFSB and PTE. The invoices on back charges on the other hand are pursuant to the construction contract. Having accounted for this crossclaim hereinabove, in my view, SFSB is entitled to pursue a set off this crossclaim under cl 30A of the amendments to the PAM contract 2006. The merits or otherwise of such crossclaim is of course a matter to be decided by the arbitrator in due course.

**[35]** Having considered all facts and based on the affidavit evidence before this court, in my considered view, there is a genuine and bona fide dispute of the alleged sum and SFSB has accordingly succeeded in establishing a prima facie case that the debt is bona fide disputed.

**[36]** In the final analysis, I would conclude that SFSB has satisfied me that there is a bona fide and substantial dispute of the alleged debt and that any winding up petition has no chance of success or is likely to fail and would cause

irreparable harm to SFSB if so presented. This conclusion would be sufficient to allow me to grant the injunction sought herein based on the applicable law as highlighted above. However, in light of the existence/issue of SFSB's crossclaim and the existence of an arbitration clause, learned counsel for SFSB also relies on certain recent decisions of the High Court to support his application and contends that a lower threshold prima facie test is now applicable.

**[37]** In this respect, reference was made to the High Court case of *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365, where Wong Chee Lin J held as follows:

> [18] The High Court granted the plaintiff an injunction to restrain the filing of the winding up application and held as follows:
>
> (a) a dispute existed whenever a claim by one side was asserted to be disputed or denied by the other;
>
> (b) the general approach to determine the existence of a bona fide dispute was whether a triable issue had been made out. The court was required to examine the affidavit evidence, and consider whether on such material, an arguable case could be made, meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute existed prima facie;
>
> (c) however, where a dispute between the parties was subject to an arbitration clause, the test was that in Salford Estates, ie, whether there was a prima facie dispute. The objective of the triable issue standard was to ensure that winding up was not staved off on tenuous grounds. However, this objective was less pressing when there was an arbitration clause. Instead, parties should be held to their agreement that disputes were to be arbitrated. Any weakness of a case should be a matter for the arbitrators, rather than the court, to decide. In addition, in these situations, the parties were essentially in dispute about the existence of a dispute. Trying to ascertain a triable issue in this context would be likely to be an exercise that would not be fruitful, efficient or proportionate, without any countervailing benefit;
>
> (d) the adoption of the lower standard in Salford Estates would not stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off creditors. First, if the issues raised were not bona fide, this would be a reason to find that there was no dispute prima facie. Second, since arbitration would have been contemplated from the time the parties entered into an agreement, there would be nothing inequitable in asking the parties to go through arbitration before they invoked the winding up process;
>
> (e) in this case, a dispute existed prima facie, as the plaintiff asserted that there was a binding settlement, but the defendant denied that there was such a settlement;

(f) the plaintiff showed that they were in prima facie compliance with the requirements of the tiered dispute resolution clause. A stricter standard should not be applied as this would be incongruent with the standard applicable to stays in favour of arbitration; and

(g) the plaintiff only needed to establish a prima facie case that the dispute regarding the putative settlement agreement fell within the arbitration clause which they did in this case. Other than that, the scope of the arbitration clause would be a matter for the arbitrator to decide on.

**[38]** Further, it is not critical that SFSB's crossclaim must have been litigated at this stage and it is sufficient for SFSB to merely show that it has a genuine crossclaim, which in my view SFSB has shown on affidavit evidence before this court. In the case of *Bakti Dinamik Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2016] MLJU 916, Mohd Nazlan bin Mohd Ghazali JC (as His Lordship then was) held as follows:

> [48] ... Further, it is not critical that the crossclaims must have been litigated, for, as made clear by the High Court in *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916, to evaluate a crossclaim which is genuine and based on substantial grounds at the stage hearing a Fortuna injunction application would be to determine the merits of that claim prematurely or to litigate the issue twice.

**[39]** In addition, during the course of oral submissions, learned counsel for SFSB had also referred me to two very recent decisions of the High Court relating to Fortuna injunction applications. I found them both instructive. The decisions were those in *PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor* [2021] MLJU 2514 which was then followed by *V Medical Services*.

**[40]** The facts of the case of *PRPC Utilities and Facilities Sdn Bhd* are quite similar to the present case. In the case of *PRPC Utilities and Facilities Sdn Bhd*, the defendants had a pending claim of RM6,579,806.74 against the plaintiff. The plaintiff however had issued a notice of arbitration to the defendants claiming a sum of RM85,203,274.96. The defendants then issued a statutory notice pursuant to s 466 of the CA 2016 for the said sum of RM6,579,806.74 which compelled the plaintiff to apply for a Fortuna injunction. The issues that arose for consideration before Wan Muhammad Amin Wan Yahya JC (as His Lordship then was) in that case were as follows:

(a) whether winding up proceedings were subject to or caught by the arbitral proceedings or an arbitration agreement/clause;

(b) whether the arbitral proceeding was the proper forum for the parties' dispute herein to be determined; and

(c) the impact the arbitral proceeding and the parties' arbitration would have on the applicable tests for a Fortuna injunction and more specifically, the proper test that should be applied.

**[41]** His Lordship there proceeded to hold that the arbitral proceeding in itself did not prohibit the defendants from presenting and proceeding with a winding up petition. I agree with the same as set out in the case of *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900; [2017] 1 LNS 943 as well as other authorities, but it is His Lordship's enunciation on the proper test where there is an arbitration agreement that I find interesting. After referring to the oft-quoted cases of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of The Commonwealth of Australia* [1978] VR 83; *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 and *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947, His Lordship went on to consider the English Court of Appeal decision of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 3 WLR 491; [2014] EWCA Civ 1575 as well as *Awangsa* in relation to the issue of how an arbitral proceeding would affect the requirements for a Fortuna injunction. The abovementioned last two cases concluded with the view that the proper test to be applied for the grant of a Fortuna injunction when there is an arbitration agreement is for the applicant to establish a prima facie case that the dispute/debt fell within the arbitration agreement ie the lower threshold prima facie test.

**[42]** In fact, in applying the decision of *Salford Estates (No 2) Ltd*, Wong Chee Lin J in the case of *Awangsa* dismissed the winding up petition and held as follows:

> [28] However, applying the lower threshold of merely showing a prima facie dispute, since the debt here is the subject matter of an arbitration clause, I am of the view that the respondent has discharged the burden of showing a prima facie dispute, bearing in mind that a denial of the indebtedness constitutes a dispute. The merits or otherwise of the dispute are matters to be decided by the arbitrator and not by this court and the respondent had given notice of arbitration to the petitioner. Accordingly, I would not stay the winding up petition pending arbitration under s 10 of the Arbitration Act 2005 but, in the exercise of my discretion under s 465 of the Companies Act 2016, I would dismiss the winding up petition on the ground that the respondent has shown the existence of a prima facie dispute which ought to be referred to arbitration.

**[43]** Having read the decision of *Salford Estates (No 2) Ltd* and having also noted that this lower threshold test propounded has been adopted in the Hong Kong Court of First Instance case of *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCU 702; [2018] HKCFI 426 and Singapore High Court case of *BDG v BDH* [2016] SGHC 211; [2016] 5 SLR 977, I see no valid

reason to depart from applying the same to this present application since there is an arbitration agreement and the same is already underway.

**[44]** Reverting then to the facts at hand and the application of this lower prima facie threshold test. As highlighted earlier in this judgment, the plaintiff in my view has not merely disputed the alleged debt on the basis that it fell under the arbitration agreement clause. The plaintiff has disputed this debt all along by contending that they always had a right to set off against LAD as is their right under the agreement.

**[45]** In this regard, I have perused the notice of arbitration dated 27 April 2022 very carefully and it will be beyond per adventure that the plaintiff contends that the consultant had, inter alia, wrongly issued the CPC and erroneously granted an extension of time entitling the plaintiff to LAD in the amount of RM4,615,000 of which full details are given. In the same, the plaintiff has also maintained, as they have all along, that they are entitled to utilise such LAD to set off against various items such as performance bond, loss and expenses as well as payment certificate No 16 and leaving a sum of money actually payable by PTE to SFSB. It is to be noted that SFSB is also seeking declarations by the learned arbitrator that the adjudication decision dated 22 February 2022 is null and void.

**[46]** In my considered view, after considering all facts, there are certainly issues that amount to a dispute that fall within the arbitration agreement that will need to be determined in the arbitration proceedings and I would thus conclude that SFSB has satisfied me that they have also passed the lower threshold prima facie test as referred to above.

**[47]** Furthermore, and in any event, even if the defendant's claim of the alleged debt of RM563,983.10 under the statutory demand is said to be undisputed as contended, the plaintiff does indeed have a crossclaim in the amount of RM4,615,000 which far exceeds that sum of which is the subject matter of the arbitral proceeding.

**[48]** In this regard, it is apt to refer to the case of *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 where Justice Datuk Darryl Goon (as he then was) held as follows:

> [35] Within the 'second branch of the principle', McGarvie J identified two possible situations when an injunction might issue to restrain the presentation of a winding up petition. The first is where the petition is to be based on a debt that is genuinely disputed on substantial grounds (see also for example *Mann and Another v Goldstein and Anor* [1968] 2 All ER 769). The second is where the existence of the creditor's debt may not be disputed, but the company 'genuinely claims on substantial grounds to have a crossclaim equal to or exceeding the petitioner's debt'.

**[49]** The issue of a genuine crossclaim has also been considered earlier in the cases of *Josu* and *Bakti Dinamik Sdn Bhd* which dealt with a crossclaim in respect of a Fortuna injunction and is a predominant reason why I have concluded that the alleged debt is bona fide disputed/disputed on substantial grounds.

**[50]** The second recent decision referred to by learned counsel for SFSB is the case of *V Medical Services*. That case dealt with a situation where the parties had a dispute arising from the termination of a distributorship agreement which contained a clause for disputes to be determined by arbitration. The defendant there had issued a statutory notice pursuant to s 466 of the CA 2016 which led the plaintiff to commence proceedings via originating summons for a Fortuna injunction on the basis that there was a substantial bona fide dispute and the debt disputed on substantial grounds. The defendant there took a similar position as in this case that there was no bona fide dispute and that the defendant was entitled to issue the statutory notice as the plaintiff had repeatedly acknowledged or admitted the debt. In arriving at her decision to allow the application for the injunction, Liza Chan Sow Keng JC (as Her Ladyship then was) after examining in detail various cases in different jurisdictions in what she titled as 'developments in the law-disputed debt governed by an arbitration agreement' went on to hold as follows:

> (1) The court was inclined to follow the *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589; [2014] EWCA Civ 1575 approach on the 'prima facie' dispute test. The fact that the debt was not admitted was sufficient to constitute a dispute, irrespective of the substantive merits of any defence. The court should not be required to investigate whether or not the debt was bona fide disputed on substantial grounds and instead, hold the parties to their bargain to resolve their dispute over the debt by their chosen method of dispute resolution to arbitrate the matter. The mere fact that there was a dispute as to the debt that fell within the scope of the arbitration agreement in the DA was sufficient cause for the Fortuna injunction to be granted for the purpose of compelling the parties to resolve their dispute via arbitration.
>
> (2) There was nothing in the circumstances asserted upon by the defendant that took this case out of the ordinary and into the domain of 'wholly exceptional circumstances'. Therefore, there was no necessity to go on to consider whether the debt was, on the facts, disputed in good faith on substantial grounds. Thus, the fairer order to be made was to allow the injunction sought for the parties to abide by the outcome of the arbitration as the dispute appeared to fall within the scope of the broadly worded arbitration clause in the DA.
>
> (3) The plaintiff had not acted in abuse of process. There was no evidence that suggested the commencement of the OS was motivated by an improper or collateral purpose or actuated by bad faith. The proper procedure was for the parties to commence arbitration proceedings for the amount claimed such that the plaintiff's claims may also be considered. The mere fact that the plaintiff's arguments may turn out to be unmeritorious did not inevitably lead to the conclusion that it

brought the OS abusively. Thus, the defendant was held to its original contractual bargain, namely, to resolve any dispute by arbitration.

**[51]** In fact, in the case of *V Medical Services*, Her Ladyship also had the opportunity to consider the recent decision of the Singapore Court of Appeal in the case of *AnAn Group (Singapore) Pte Ltd v VTB Bank* [2020] SGCA 33 and held that the same significantly altered the law in this area in so far as crossclaims or disputed debts which are subject of arbitration agreements are concerned.

**[52]** In my considered view, the decisions in the afore-discussed/referred recent cases do not necessarily mean that no debt is owed by SFSB. On the contrary, all it means is that the disputed debt ought to be contested in the agreed contracted forum ie arbitration proceedings. I agree that the parties should be held to their bargain to resolve their dispute over the debt by their chosen method of arbitration. The fact that there was a dispute of the debt that fell within the scope of the arbitration agreement is also sufficient reason to grant the Fortuna injunction so as to mandate a resolution of their dispute through an arbitration process as agreed upon by the parties.

**[53]** I do not see any reason to depart from the decided principles of the above two High Court cases which were arrived at after a detailed examination of the current decisions in other jurisdictions which appear to have followed *Salford Estates (No 2) Ltd* and I would accordingly and gratefully adopt the same.

**[54]** As such, in the final analysis, I am of further view that this dispute between the parties should be decided by arbitration as agreed by the parties. The merits of SFSB's and PTE's claims are a matter to be decided in the arbitration proceedings. In my opinion, it was certainly in the interest of justice to allow this application and for parties to abide by the outcome of the arbitration proceedings as contractually agreed and already underway.

**[55]** Quite apart from the fact that I have concluded that there is a bona fide dispute of the alleged debt, I am also minded to grant the injunction as sought as SFSB has shown to my satisfaction that they are in fact a commercially solvent entity and that the presentation of any winding up petition will cause irreparable harm and will have severe repercussions on them. In this regard, PTE submits that the solvency of SFSB is irrelevant and that there is no reason why they should not be paid now with reliance being placed on cases such as *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2018] 9 MLJ 305. However, in those cases referred to, the courts had enunciated that in situations where a Fortuna injunction was being sought pending an appeal against a judgment, then, solvency is irrelevant. However, in light of the fact that there

is no judgment in the case at hand, and bearing in mind that I have concluded that there is a bona fide dispute of the alleged debt, the commercial solvency is in my view a relevant consideration.

**[56]** In the case of *Ecofirst Hartz Sdn Bhd v Poon Mun Cheong & Anor* [2018] MLJU 901, the plaintiff applied for a Fortuna injunction and annexed a copy of its latest bank statement to show its solvency. In granting a Fortuna injunction and finding that commercial solvency is a relevant consideration in an application for a Fortuna injunction, Mohd Nazlan J (as His Lordship then was) held as follows:

> [73] In my view, commercial solvency, whilst clearly a critical issue to be determined by the courts when assessing whether or not a winding up order ought to be granted on the basis of a notice issued under s 218(1) of the Companies Act 1965 (concerning the company being unable to pay its debts) should also be a consideration at the injunction application stage, but cannot without more defeat the position of an undisputed debt, especially one grounded on a judgment debt. I think it is more correct in principle that if there is no dispute on the debt, the solvency of the debtor should not be allowed to prevent the grant of a Fortuna injunction.

**[57]** In addition to SFSB being a wholly owned subsidiary of SP Setia and a commercially solvent company that is able to satisfy the alleged debt, SFSB had in fact proven its commercial solvency by depositing the sum of RM563,983.10 into its solicitors' client account. In this regard, SFSB's financial solvency is not an issue and not challenged by PTE at all.

**[58]** I would also add that the payment of the alleged debt into SFSB's solicitors' clients' account constitutes a security or a compounding of the sum demanded under the statutory notice dated 27 October 2022.

**[59]** A similar situation arose in *Pacific & Orient Insurance Co Berhad v Mazlan bin Ahmad* [2015] MLJU 764, where the plaintiff had deposited the demanded sum under the statutory notice issued under the previous s 218 of the Companies Act 1965 (equivalent to the present s 466(1)(a) of the CA 2016) into the plaintiffs' solicitors' clients' account. The High Court in granting the Fortuna injunction held as follows:

> [104] If the plaintiff has secured or compounded the demanded sum to the reasonable satisfaction of the defendants as provided in s 218(2)(a) of the CA, the defendants cannot present a winding up petition against the plaintiff based on the demanded sum.
>
> [105] In this case, it is not disputed that the plaintiff has paid the sum stated in KLHC's judgment together with interest and costs into the client account of the plaintiff's solicitors (plaintiff's payment into solicitor's client account). Once money has been paid into a client account of a solicitor, the Solicitors Account Rules

1990 ('the SAR') shall apply. Money can only be withdrawn from a solicitors client account as provided in rr 7 and 8 of the SAR. I am satisfied that the plaintiff's payment into solicitor's client account constitutes a security or a compounding of the demanded sum to the reasonable satisfaction of the defendants within the meaning of s 218(2)(a) of the CA.

**[60]** Given SFSB's ability to satisfy the judgment sum, this would mean that the petition if presented, it would have no chance of success and be bound to fail. In *Dolomite Readymixed Concrete Sdn Bhd v Zalam Corporation Sdn Bhd* [2008] MLJU 270, the High Court in granting a Fortuna injunction held that the plaintiff by depositing the judgment sum into its solicitors' account demonstrates that it able to pay its debt and the winding up petition if presented, would have no chance of success. The High Court held:

> Adopting the test in *Mobikom* it follows that the plaintiff's application would not succeed. But there is another factor to consider. The plaintiff in its affidavit in support has deposed to the fact that it had in fact paid the judgment sum into the account of its solicitor to demonstrate that it is not insolvent and is able to pay its debt and therefore should not have been the subject of a winding up petition under s 218(1)(e). The court in *RHB Bank* has observed that: 's 218(1)(e) of the Act speaks of the company being 'unable to pay its debts' as opposed to merely an unwillingness on its part to pay any isolated debt that it may owe to any creditor, although such a refusal would attract the deeming provision in s 218(2) of the Act thereby placing upon the company the burden of proving that it is able to pay its debts. But once the company proves to the satisfaction of the court that it is not commercially insolvent, that is to say it is perfectly capable of paying all its debtors every sen in the ringgit, the fact that it would not pay the individual debt of the petitioner for whatever reasons private or otherwise, is quite irrelevant when deciding whether a winding up order should be made.
>
> The fact that the plaintiff has demonstrated that it is able to pay the defendant's debt in this case must necessarily mean that it is not commercially insolvent and is therefore not unable to pay its debt and should not therefore be subjected to a petition to wind up. The petition if presented would have no chance of success and is bound to fail.

**[61]** In any event, bearing in mind that the said disputed debt sum had been deposited with SFSB's solicitors, I made the consequential order that the said sum be placed in an interest-bearing fixed deposit account and to be held by SFSB's solicitors pending the decision by the learned arbitrator.

**[62]** Finally, in relation to the issue of whether the presentation of a petition will cause irreparable harm to SFSB, PTE rely on decisions such as *Pacific & Orient Insurance Co Bhd* and submit that the same is irrelevant. However, with respect, those cases have held that the issue of whether irreparable harm is caused is irrelevant when the debt is not bona fide disputed. In the present case, as I have concluded that the debt is bona fide disputed, then, whether or not the

presentation of a winding up petition would cause irreparable harm is certainly a factor to consider. In this regard, I have no hesitation in concluding that it would.

**[63]** In this regard, as averred and submitted, the repercussions of the presentation of a winding up petition are far-reaching and would be devastating to SFSB's business and various other third parties including homebuyers as SFSB is currently engaged in numerous major construction projects and the presentation of a winding up petition will have adverse implications on these projects and its business where it would cause SFSB to breach its contractual obligations and risk being sued for breach of contract by third parties and consequently affect the purchasers of these properties too.

**[64]** The adverse implications would further damage SFSB's business relationships with its business partners and these business partners would not be inclined to enter into business dealings with SFSB and may risk termination of their ongoing business dealings with SFSB.

**[65]** SFSB's banking facilities with financial institutions would also be affected as SFSB's bank accounts will be suspended thereby impacting SFSB's ability to operate its business as a major property developer.

**[66]** In these circumstances, PTE's presentation of a winding up petition would inevitably and irreparably affect SFSB's image, reputation and SFSB's ability to meet existing contractual obligations.

**[67]** As held in the case of *Re Bayoil SA; Seawind Tankers Corp v Bayoil SA* [1999] 1 All ER 374, the England Court of Appeal held that a winding up order was a draconian order and if wrongly made, the company had a little commercial prospect of reviving itself and recovering its former position. If there was any doubt about the claim, the court should proceed cautiously.

**[68]** In *Ecofirst Hartz Sdn Bhd*, the High Court in granting a Fortuna injunction recognised the consequences and irreparable damage that a winding up may have on a company and held as follows:

> [66] Secondly, the presentation of such a petition might also consequent upon irreparable damage to the company. Its business reputation as a housing developer would be affected from the publicity accompanying the advertisement of the petition. Its bank accounts would likely be frozen, adversely interfering with its business operations. Its banking and credit commitments may be jeopardised as standard loan agreements usually contain event of default clauses which are triggered by the presentation of winding up petition.

A [67] The project itself may be affected, as would the end purchasers who had secured housing loan financing. Some of these adverse consequences may be immeasurable and irreparable, and cannot be compensated in damages. It should also be mentioned that the plaintiff itself is a wholly owned subsidiary of a publicly listed company, a diversified group with core businesses in property development B and property investment and management. In this regard, I would say that the balance of convenience and the justice of the case would lie with the granting of the Fortuna injunction (see also *Malayan Flour Mills Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591).

C **[69]** Further, reference is made to the case of *Lau Jick Ing v Lim Heng Sean @ Eddie Lim & Anor* [2021] 8 MLJ 9 where the High Court held as follows:

[37] Firstly, as a going concern company it is unjust and inequitable to wind up the second defendant. Secondly winding up is a drastic action not only to the second defendant as a going concern but also to the creditors of the second defendant. D Thirdly the remedy sought in winding up and derivative action are different ... Thus the winding up of the second defendant will serve the first defendant's interest as a shareholder but will cause irreparable damage to the second defendant which is a going concern. This is especially so in light of the future fees commission it is expected to continue to receive from Sutera Matra for the service stations procured E by the plaintiff for the next 20–25 years.

CONCLUSION

F **[70]** In the final analysis, and upon a judicious consideration of all matters, I find that there are indeed serious issues to be tried in the arbitration proceedings that are already underway and that parties should allow their dispute(s) to be resolved in that forum as contractually agreed. In my view, the balance of convenience lies in favour of granting such injunction to restrain G PTE in that they should not be allowed to commence winding up proceedings against SFSB for what I have held to be a bona fide disputed debt which will then defeat the final determination of the dispute/issues through the agreed arbitration process. Further, I find that any winding up petition is bound to fail/likely to fail and that the presentation of the winding up petition would H cause irreparable damage to SFSB especially since they are commercially solvent.

**[71]** Since the disputed sum has been deposited by SFSB with their solicitors pending the outcome of this application, I found it just and fit to order that the I said sum be placed in an interest-bearing account and be held by them pending the conclusion of the arbitration proceedings.

**[72]** As for costs, I ordered PTE to pay SFSB the sum of RM7,500 subject to allocator.

*Application allowed.*

Reported by Ahmad Ismail